Lam Soon (M) Bhd v Kesatuan Pekerja-pekerja Perkilangan Perusahaan Makanan

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3–25–36–98
NIK HASHIM J
17 DECEMBER 1998

Labour Law *— Industrial Court — Award — Failure to consider provisions of s 30(4) of Industrial Relations Act 1967 — Error on the face of the award — Whether award should be allowed to stand*

Labour Law *— Industrial Court — Award — Based on statutorily prohibited evidence — Whether contrary to s 54(1) and (3) of the Industrial Relations Act 1967*

The Minister of Human Resources had referred to the Industrial Court a trade dispute between Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan ('the Union') and Lam Soon (M) Bhd ('the company'). Prior to the hearing in the Industrial Court, the parties had been involved in conciliation proceedings. During these proceedings, amongst other things, the company had submitted a proposal in which it agreed to maintain a certain provision for ex-gratia payment to employees (a position now reflected in art 41(b) of the Industrial Court's award).

After the Industrial Court had handed down its award, the company made this application under O 53 of the Rules of the High Court 1980 for an order of certiorari to quash certain parts of the award which it was dissatisfied with.

Held, allowing the application:

The Industrial Court had failed to have regard to the provision of s 30(4) of the Industrial Relations Act 1967 when making the award. There is no mention whatsoever in the award that the learned Chairman had ever referred to or taken into account the provisions of s 30(4) in his decision. The court's finding that the financial performance of the company had been satisfactory, without regard to the public interest and the effect of the award on the economy of the country, and the probable effect in similar industries, is insufficient to satisfy the requirements under s 30(4) (see p 350E–351A). There was also error apparent on the face of the award and hence it cannot be allowed to stand (see p 351C).

The award in art 41(b) has no legal basis as it was based upon the company's proposal submitted at the conciliation proceedings, and by virtue of s 54(1) and (3) of the Industrial Relations Act 1967 is prohibited from being given before the Industrial Court. The panel members, having had the knowledge of statutorily prohibited evidence which is prejudicial to the company's case, ought in the interest of justice to have declined to hear the case (see p 352B–F).

[Bahasa Malaysia summary

Menteri Sumber Manusia telah merujuk kepada Mahkamah Perindustrian suatu pertikaian perdagangan di antara Kesatuan Pekerja-pekerja Perkilangan Perusahaan Makanan ('Kesatuan tersebut') dan Lam Soon (M) Bhd ('syarikat tersebut'). Sebelum perbicaraan di Mahkamah Perindustrian, pihak-pihak telah terlibat di dalam prosiding-prosiding perdamaian. Semasa prosiding-prosiding ini, antara lain-lain perkara-perkara, syarikat tersebut telah menyerahkan suatu cadangan dalam mana ia bersetuju untuk mengekalkan peruntukan tertentu untuk bayaran ex gratia kepada pekerja-pekerja (kedudukan yang kini dicerminkan di dalam art 41(b) award Mahkamah Perindustrian).

Setelah Mahkamah Perindustrian mengumumkan awardnya, syarikat tersebut membuat permohonan ini di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk suatu perintah certiorari untuk membatalkan bahagian-bahagian tertentu award yang ia tidak berpuas hati.

Diputuskan, membenarkan permohonan:

Mahkamah Perindustrian telah gagal mengambil kira peruntukan s 30(4) Akta Perhubungan Perusahaan 1967 apabila membuat award tersebut. Tiada disebutkan walau apa pun di dalam award tersebut bahawa Pengerusi yang bijaksana pernah merujuk kepada atau mengambil kira peruntukan s 30(4) di dalam keputusan beliau. Penemuan mahkamah bahawa pelaksanaan kewangan syarikat tersebut adalah memuaskan, tanpa mengambil kira kepentingan awam dan kesan award ke atas ekonomi negara, dan kesan yang mungkin di dalam industri-industri yang serupa, adalah tidak mencukupi untuk memuaskan keperluan-keperluan di bawah s 30(4) (lihat ms 350E–351A). Terdapat juga kesilapan nyata pada permukaan award dan maka ia tidak boleh dibenarkan kekal (lihat ms 351C).

Award tersebut di dalam art 41(b) tiada dasar dari segi undang-undang memandangkan ia adalah bergantung kepada cadangan syarikat tersebut yang diserahkan semasa prosiding-prosiding perdamaian, dan disebabkan oleh s 54(1) dan (3) Akta Perhubungan Perusahaan 1967 adalah dilarang daripada dikemukakan di hadapan Mahkamah Perindustrian. Ahli-ahli panel, yang mempunyai pengetahuan keterangan yang dilarang secara statutori yang mana adalah memprejudiskan kes syarikat tersebut, seharusnya di dalam kepentingan keadilan menolak untuk membicarakan kes tersebut (lihat ms 352B–F).]

Notes

For cases on Industrial Court awards, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1029–1052.

Cases referred to

Malayan Commercial Banks Association v National Union of Bank Employees (January - June 1982, MLLR 246) (refd)

Malayawata Steel Bhd v Mohd Yusof bin Abu Bakar & Anor [1994] ILR 249 (refd)

Mersing Omnibus Co Sdn Bhd v Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor [1998] 2 CLJ Supp 53 (refd)

OYL Condair Industries Sdn Bhd v Kesatuan Pekerja-Pekerja Perusahaan Letrik [1998] 1 ILR 319 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 26(1), 30(4), (5), 54(1), (2), (3)
Rules of the High Court 1980 O 53

TM Varughese (*TM Varughese & Co*) for the applicant.
A Murugavell (*P Vickneswaren* with him) (*Murugavell Arumugam & Co*) for the respondent.

Cur Adv Vult

Nik Hashim J: Pursuant to s 26(1) of the Industrial Relations Act 1967 ('the Act'), the Minister of Human Resources referred a trade dispute between the Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan ('the Union') and Lam Soon (M) Bhd ('the company') relating to 17 articles in the proposed new collective agreement on terms and conditions of employment applicable to the concerned employees for the period of 1 January 1997 to 31 December 1999. On 12 March 1997, the Industrial Court handed down the award ie Award No 130 of 1998. Dissatisfied with arts 8, 18, 41(a) and (b) and Appendix 1 of the award, the company applied under O 53 of the Rules of the High Court 1980 for an order of certiorari to quash art 8 (increase of laundry expenses from RM17 to RM25), art 18 (increase of acting allowance from RM6 to RM10 per day), art 41(a) (increase of salary adjustments from 7.5% to 10%), art 41(b) (for maintaining the existing one month basic salary ex-gratia payment) and Appendix 1 (increase of salary range between 15% to 29%), on the grounds that the Industrial Court erred in law and without or in excess of jurisdiction in that it came to a decision in breach of s 30(4) and (5) of the Act.

Learned counsel for the Union however, argued that there was sufficient compliance with s 30(4) and that the award was fair, reasonable and not perverse, and therefore, urged the court to dismiss the application.

In the case of *Mersing Omnibus Co Sdn Bhd v Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia & Anor* [1998] 2 CLJ Supp 53, I had the occasion to observe on s 30(4) at p 56 where I said:

> By its terms, s 30(4) is a statutory requirement which the Industrial Court must take into account when deciding a trade dispute. It is a relevant provision. Section 30(4) states:

> In making its award in respect of a trade dispute, the court shall have regard to:
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> (i) the public interest;
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> (ii) the financial implications; and
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> (iii) the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.

I then continued at p 57 and said:

> Section 30(4) is mandatory in its terms by reason of the words '... the Court shall have regard to ...' in the section and hence obligatory. Accordingly therefore, strict compliance of its provision is called for and thus, failure to adhere to the provision renders the impugned award erroneous in law. Authorities have shown that an inferior tribunal, of which the Industrial Court is one, has no jurisdiction to commit an error of law (see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147). If it does make such an error, then it exceeds its jurisdiction, for which an order of certiorari may be issued. (*Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317). There is no degree of nullity and if there is an error of law on which the award of the Industrial Court is founded, such error must necessarily be without jurisdiction or in excess of jurisdiction (see *Enesty Sdn Bhd v Transport Union & Anor* [1986] 1 MLJ 18).

I would apply the same principle in approaching this case.

Based on the award and the recorded evidence of the Industrial Court, I hold that the Industrial Court had failed to have regard to the provision of s 30(4) when making the award. There is no mention whatsoever in the award that the learned Chairman had ever referred to and taken into account the provision of s 30(4) of the Act in his decision. While it is true that the Industrial Court must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form (s 30(5)), the Industrial Court nevertheless cannot disregard the provision of s 30(4) in its decision in this case. The section is a statutory safeguard which the Industrial Court is obliged to have regard to in making the award relating to a trade dispute. Thus, in order to make the award respecting the impugned arts 8, 18, 41(a), and (b) and the Appendix 1 valid under the Act, the Industrial Court must make clear in its decision that the three elements in the section have been considered and make its findings accordingly. In the Industrial Court case of *Malayan Commercial Banks Association v National Union of Bank Employees* (January - June 1982, MLLR 246), Harun J said:

> Salary increase in the private sector, however, are further subject to the employer's ability to pay, the salary levels in related or similar industries and *its effect on the economy of the country as a whole.* (Emphasis added.)

In the present case, the Industrial Court did not consider at all the effect of the award on the economy of the country as a whole. The finding of the Industrial Court that: 'The Court is also satisfied that the company's financial performance have been satisfactory in terms of profitability, liquidity and earning per share in determining the overall financial

A performance of the company' (p180 of record), without regard to the public interest and the effect of the award on the economy of the country, and the probable effect in similar industries, is insufficient to satisfy the requirements under s 30(4). Thus, failure to comply with the section renders the award erroneous for which an order of certiorari may be issued.

B The Industrial Court, after having ordered the salary adjustment of 10% at p 177 of record, went on further and ordered at p 180 salary adjustments of RM80.00 and this contradicted its own decision, which is reflected at p 182 under Appendix 1. The annual salary increment has been ordered to increase from 15% to 29% in breach of its own decision. The orders are so unreasonable and perverse. There is also a further error on the C face of the award in Appendix 1 under the heading 'Salary Range 1997–1999' in respect of job grades 'Fl/W4' and 'M3/C4' where the figures '690' should read '640' and '910' should read '710 respectively. This is clearly an error apparent on the face of the award. Hence, it cannot be allowed to stand.

D Since the disputed award was founded in total disregard to the relevant and mandatory provision of s 30(4), and because of the errors on the face of the record, I hold that the award so given is arbitrary and not in accordance with the law and thus, the award may be quashed on these grounds.

However, that is not the end of the matter. There is another matter E advanced by the company's counsel which merits my consideration. The matter relates to s 54 of the Act which states:

> (1) Where a trade dispute relates to matters as to which negotiation or conciliation proceedings have taken place under this Act, no evidence shall be given in the proceedings before the Court as to such negotiation or conciliation proceedings other than a written statement in relation F thereto agreed to and signed by the parties to the dispute.
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> (2) ...
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> (3) No evidence shall be given in proceedings before the Court with regard to any offer relating to any matter connected with the trade dispute made without prejudice by any person or trade union except with the consent G of that person or trade union.

At the outset of the hearing before the Industrial Court on the 24 September 1997, the company's representative raised a preliminary objection over the Union's disclosure to the Industrial Court in its first statement of case, 'U6', in which the company's counter proposal relating to the disputed art 41(b), H which the company agreed to maintain its current provision in the collective agreement, was exhibited. The company's proposal reads:

> Employees who have served for one year will be granted one month basic salary ex-gratia payment.

This proposal was submitted at the conciliation proceedings at the office of I the Director General, Industrial Relations Department and by virtue of s 54(1) and (3), the proposal is prohibited from being given before the Industrial Court. The company's representative urged the panel members

of the Industrial Court to withdraw from hearing the case further to prevent a likelihood of being biased. The Industrial Court ruled against the said preliminary objection and ordered the case be fixed on 22 and 23 December 1997 for hearing. However, there is no record of the objection proceedings in the notes of evidence and the impunged award. But at p 176 of record respecting art 41, the learned Chairman at p 177 said:

> The company, on the other hand, now proposes a 7.0% adjustment, whilst agreeing to maintain provision of (b) above for reasons ... .

The record shows that the company did not at any stage of the Industrial Court proceedings agree to maintain the provision of art 41(b). The company's proposal on art 41(b) as in its statement in reply, exhibit 'CO-1' at p 141 of record, has been 'NIL'. Despite this, the Industrial Court still stated in its award that the company agreed to the provision in art 41(b). It is therefore obvious that the Industrial Court was influenced by 'U6', which was supposed to have been treated as expunged, being statutorily prohibited evidence. 'U6' was never consented by the company to be given before the Industrial Court. It was this evidence which prompted the Industrial Court to order in the award at p 177 in art 41(b) as 'agreed provision' whereas in actual fact it was never agreed or offered by the company at any stage. Thus, the award in art 41(b) has no legal basis and hence erroneous in law. The panel members, having had the knowledge of statutorily prohibited evidence through the statement of 'U6', which is prejudicial to the company's case, ought in the interest of justice to have declined to hear the case and allowed the company's application that the case be heard before another division of the Industrial Court and different panel members, as was ordered in the case of *OYL Condair Industries Sdn Bhd v Kesatuan Pekerja-Pekerja Perusahaan Letrik* [1998] 1 ILR 319.

In the result, I allow the application, and order that certiorari be issued to quash the impugned arts 8, 18, 41(a) and (b) and Appendix 1. In order to make the collective agreement on terms and conditions of employment complete, I further order that these articles be remitted back for re-adjudication by another division of the Industrial Court and different panel members (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Malayawata Steel Bhd v Mohd Yusof bin Abu Bakar & Anor* [1994] ILR 249). Under the circumstances of this case, I make no order as to costs.

Application allowed.

Reported by Joel Ng